No. 16366

United States
Court of Appeals
for the Ninth Circuit

JOHN L. OWEN,

Appellant,

vs.

SEARS, ROEBUCK AND COMPANY, a Corporation,

Appellee.

Transcript of Record

In Two Volumes

Appeal from the United States District Court for the District of Oregon.

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—3-27-59

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

NICHOLAS GRANET,
Loyalty Building,
Portland 4, Oregon,

For Appellant.

KOERNER, YOUNG, McCOLLOCH & DEZENDORF,
JOHN GORDON GEARIN,
800 Pacific Building,
Portland 4, Oregon,

For Appellee.

In the United States District Court
for the District of Oregon

Civil No. 9195

JOHN L. OWEN,

Plaintiff,

vs.

SEARS ROEBUCK AND COMPANY, a Corporation,

Defendant.

AMENDED COMPLAINT FOR DAMAGES FOR PERSONAL INJURIES

Comes now the plaintiff and for cause of action against the defendant alleges as follows:

I.

That the defendant is and at all times herein mentioned was a corporation duly organized and existing under the laws of the State of New York, with an office and principal place of business in the City of Portland, County of Multnomah, State of Oregon, and was and is engaged generally in the retail department store business, and owned and operated a retail store at 524 N.E. Grand Avenue, Portland, Multnomah County, Oregon.

II.

That in the month of May, 1955, plaintiff bought from defendant at defendant's said store a sport shirt, bearing the name "Pilgrim," and paid defendant $2.98 therefor. That defendant then and

there warranted said shirt to be in all respects fit and proper for use as an item of wearing apparel; that plaintiff relied upon said warranty and was induced thereby to purchase said shirt.

III.

That said shirt was made of a highly flammable type of cloth, which fact was unknown to plaintiff, and was known or should have been known by defendant, and by reason of this flammability, said shirt was not fit for use as wearing apparel.

IV.

That plaintiff, while wearing the said shirt, on July 15, 1955, came in close proximity to an open flame and the said shirt became ignited. That immediately thereafter the flames spread over the whole surface of said shirt causing plaintiff's skin to be burned on his arms and about the trunk of his body.

V.

That as a result of said ignition of this said shirt, plaintiff suffered shock, excruciating pain and mental anguish; that plaintiff's skin at the places where he was burned, has become extremely sensitive and tender to the application and touch of all matter of thing and substance; ugly, red, permanent scars about the trunk and arms of the body; that these said injuries are permanent; that because of these premises, plaintiff has been damaged in the sum of $40,000.00 general damages.

VI.

That all of the aforesaid was within the contemplation of the parties hereto at the time of the purchase of said shirt as a direct and natural result of any breech of warranty thereon.

VII.

That plaintiff has incurred as a direct result of said breech of warranty wage losses in the sum of $740.00, and doctor and medical bills in the sum of $637.00, all to his special damage in the total sum of $1,377.00.

Wherefore, plaintiff prays for judgment against the defendant for $40,000.00 general damages, $1,377.00 special damages, and for his costs herein.

NICHOLAS GRANET,

/s/ N. GRANET,
Attorney for Plaintiff.

Duly verified.

[Endorsed]: Filed September 1, 1957.

[Title of District Court and Cause.]

ANSWER

Comes now defendant and for answer to plaintiff's complaint, alleges:

First Defense

Plaintiff's complaint fails to state a claim upon which relief can be granted.

Second Defense

Plaintiff's complaint fails to allege facts conferring jurisdiction upon this Court, and, therefore, this Court has no jurisdiction over this action.

Third Defense

Defendant denies each and every allegation of plaintiff's complaint and the whole thereof, except defendant admits Paragraph I of said complaint.

Fourth Defense

The sole, proximate, contributing or concurring cause of plaintiff's injury and damage, if any, was his own contributory negligence.

Wherefore, having fully answered plaintiff's complaint, defendant demands judgment.

KOERNER, YOUNG, McCOLLOCH & DEZENDORF,

JOHN GORDON GEARIN,

/s/ JOSEPH LARKIN,
Attorneys for Defendant.

Service of copy acknowledged.

[Endorsed]: Filed June 18, 1957.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated between the parties that the Answer heretofore interposed by defendant

might stand as and for the Answer to the Amended Complaint herein.

Dated this 5th, day of September, 1957.

/s/ NICHOLAS GRANET,
Attorney for Plaintiff.

/s/ JOHN GORDON GEARIN,
Of Attorneys for Defendant.

[Endorsed]: Filed September 9, 1957.

[Title of District Court and Cause.]

PRETRIAL ORDER

The above-entitled cause came on regularly for pretrial conference before the undersigned judge of the above-entitled court on March 17, 1958. Plaintiff appeared by Nicholas Granet, his attorney. Defendant appeared by John Gordon Gearin, of its attorneys.

The parties, with the approval of the court, agreed to the following:

Statement of Facts

Plaintiff is a citizen, resident and inhabitant of the State of Oregon. Defendant is a New York corporation. The amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00.

Plaintiff's Contentions

Plaintiff contends:

I.

That in the month of May, 1955, plaintiff bought from defendant at defendant's said store a sport shirt, bearing the name "Pilgrim," and paid defendant $2.98 therefor. That defendant then and there warranted said shirt to be in all respects fit and proper for use as an item of wearing apparel; that plaintiff relied upon said warranty and was induced thereby to purchase said shirt.

II.

That said shirt was made of a highly flammable type of cloth, which fact was unknown to plaintiff, and was known or should have been known by defendant, and by reason of this flammability, said shirt was not fit for use as wearing apparel.

III.

That plaintiff, while wearing the said shirt, on July 15, 1955, came in close proximity to an open flame and the said shirt became ignited. That immediately thereafter the flames spread over the whole surface of said shirt causing plaintiff's skin to be burned on his arms and about the trunk of his body.

IV.

That as a result of said ignition of this said shirt, plaintiff suffered shock, excruciating pain and mental anguish; that plaintiff's skin at the places where he was burned, has become extremely sensitive and tender to the application and touch of all matter of thing and substance; ugly, red, permanent

scars about the trunk and arms of the body; that these said injuries are permanent; that because of these premises, plaintiff has been damaged in the sum of $40,000.00 general damages.

V.

That all of the aforesaid was within the contemplation of the parties hereto at the time of the purchase of said shirt as a direct and natural result of any breach of warranty thereon.

VI.

That plaintiff has incurred as a direct result of said breach of warranty wage losses in the sum of $740.00, and doctor and medical bills in the sum of $637.00, all to his special damage in the total sum of $1,377.00.

* * *

Defendant denies the foregoing contentions of plaintiff.

Issues to Be Determined

1. Did plaintiff purchase a shirt from the defendant?

2. If so, was the shirt which plaintiff purchased of highly flammable type and by reason thereof, not fit for use as wearing apparel?

3. Did the defendant breach its warranty of fitness for purpose?

4. Did plaintiff receive injuries as a direct and proximate result of defendant's breach of warranty?

5. If so, what is the amount of plaintiff's damage?

Jury Trial

Plaintiff made timely request for trial by jury.

Physical Exhibits

Certain physical exhibits have been identified and received as pretrial exhibits, the parties agreeing, with the approval of the court, that no further identification of exhibits is necessary. In the event that said exhibits, or any thereof, should be offered in evidence at the time of trial, said exhibits are to be subject to objection only on the grounds of relevancy, competency and materiality.

Plaintiff's Exhibits

1. Pilgrim shirt (defendant does not waive the identification of this exhibit).
2. A, B, C pictures.
3. Medical records.
4. X-rays (if taken).

Defendant's Exhibits

5. Three shirts of same lot number as the shirt allegedly purchased by plaintiff and made from the same material.
6. Medical reports.
7. Photographs.
8. Deposition of Mabel Constance Owen.
9. Deposition of John L. Owen.

10. Letter from Granet & Gray to Dan River Mills, Incorporated, dated December 31, 1956.

The parties hereto agree to the foregoing pretrial order and the court being fully advised in the premises,

Now Orders that the foregoing pretrial order shall not be amended except by consent of both parties, or to prevent manifest injustice; and it is further

Ordered that the pretrial order supersedes all pleadings; and it is further

Ordered that upon trial of this cause no proof shall be required as to matters of fact hereinabove specifically found to be admitted, but that proof upon the issues of fact (and law) between plaintiff and defendant as hereinabove stated shall be had.

Dated at Portland, Oregon, this 30th day of September, 1958.

/s/ WILLIAM G. EAST,
United States District Judge.

Approved:

/s/ N. GRANET,
Attorney for Plaintiff.

/s/ JOHN GORDON GEARIN,
Of Attorneys for Defendant.

Lodged March 7, 1958.

[Endorsed]: Filed September 30, 1958.

[Title of District Court and Cause.]

VERDICT

We, the jury, duly impaneled and sworn to try the above-entitled case, do find our verdict in favor of defendant and against the plaintiff.

Dated this 30th day of Sept., 1958.

/s/ GLENN L. SWERINGER,
Foreman.

[Endorsed]: Filed September 30, 1958.

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

Comes now the plaintiff by his attorney, Nicholas Granet, and moves the above-entitled Court for an order granting the plaintiff a new trial on the ground of judicial error and that the Court, in allowing a motion for a directed verdict in favor of the defendant, stated that it was necessary for the plaintiff to show negligence in an action on an implied warranty of fitness of use of merchandise sold by a retailer to a consumer.

Plaintiff submits that in an action based upon implied warranty of fitness proof of negligence is unnecessary for recovery in such an action and the plaintiff respectfully cites the recent decision of:

"Michael Blessington, Admr., etc., of Michael Blessington, Jr., Deceased, v. McCrory Stores Corporation, et al. (Two cases.) New York Court of Appeals—March 5, 1953 (305 NY 140, 111 NE 2d 421, 37 ALR 698)."

(Attached hereto and made a part hereof, is a photostatic copy of said citation from 37 ALR 2d.)

Based upon the above, plaintiff respectfully moves the Court for an order granting a new trial on the ground of judicial error.

Dated this 2nd day of October, 1958.

/s/ N. GRANET,
Attorney for Plaintiff.

[Endorsed]: Filed October 2, 1958.

[Title of District Court and Cause.]

ORDER

This matter came on for hearing upon the plaintiff's motion for the Court's order granting a new trial in the above-entitled cause.

It appears from the records and files of the cause that the Court ordered a directed verdict in favor of the defendant at the close of plaintiff's case in chief. The theory upon which the plaintiff advanced was that of a breach of warranty in the sale of a

chattel by defendant and, after hearing the statements and arguments of counsel, the Court observed:

"Now, the question is here we are dealing purely with a breach of contract. The plaintiff's evidence is that the garment was purchased from the defendant. The evidence then shows that in the course of lighting the cigarette his shirt burned. I see absolutely nothing that shows that the garment was not constructed, did not represent all that it was warranted to be. So, I am forced to grant the motion."

The Court, having reconsidered the matter, is of the same opinion, and

Therefore, It Is Ordered that plaintiff's motion for a new trial in the above-entitled cause be and the same is hereby denied.

Dated October 24, 1958.

/s/ WILLIAM G. EAST,
United States District Judge.

[Endorsed]: Filed October 24, 1958.

[Title of District Court and Cause.]

MOTION

Comes now the plaintiff and pursuant to Rule 60 (a) of the Rules of Civil Procedure, moves the Court for entry of judgment nunc pro tunc as of September 30, 1958, upon the grounds and for the reason that upon said date the Court, sitting with a jury,

directed a verdict in favor of the defendant but a judgment was not entered thereon.

NICHOLAS GRANET,

By /s/ RALPH W. DUNCANSON,
Of Attorney for Plaintiff.

ORDER

It Is So Ordered.

Dated this 7th day of Nov., 1958.

/s/ WILLIAM G. EAST,
Judge.

Service of copy acknowledged.

[Endorsed]: Filed November 10, 1958.

In the United States District Court
for the District of Oregon

Civil No. 9195

JOHN L. OWEN,

Plaintiff,

vs.

SEARS, ROEBUCK AND CO., a Corporation,

Defendant.

JUDGMENT

This cause having come on regularly for trial before the above-entitled Court, sitting with a jury,

and the evidence on the part of the plaintiff having been presented herein, and the Court having thereupon on motion of the defendant, directed a verdict for the defendant and against the plaintiff, and the jury having returned its verdict accordingly and the same having been received and entered; it is, therefore,

Hereby Ordered and Adjudged that plaintiff take nothing by his action and that the defendant have judgment against the plaintiff for his costs and disbursements incurred herein, taxed at $63.05.

Dated this 7th day of Nov., 1958.

/s/ WILLIAM G. EAST,
Judge.

[Endorsed]: Filed November 10, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Sears, Roebuck and Co., a corporation, and to Koerner, Young, McCollock & Dezendorf (John Gordon Gearin), its attorneys:

You are hereby given notice that the plaintiff appeals to the United States Court of Appeals for the Ninth Circuit from that certain judgment entered herein on or about the 30th day of September, 1958, and the whole thereof.

Dated this 18th day of November, 1958.

NICHOLAS GRANET,

By /s/ RALPH W. DUNCANSON,
Of Attorneys for Plaintiff.

Service of copy acknowledged.

[Endorsed]: Filed November 18, 1958.

[Title of District Court and Cause.]

COSTS ON APPEAL BOND

Whereas, the Plaintiff in the above-entitled proceedings has appealed to the United States Court of Appeals for the 9th Circuit from that certain Judgment made, rendered and entered under date of September 12, 1958, in the above-entitled Court wherein a Judgment was entered upon a directed verdict for the Defendant, and said Plaintiff being aggrieved thereby and desiring to appeal said Judgment to the United States Court of Appeals for the 9th Circuit;

Now, Therefore, in consideration of the premises, we, John L. Owen, and the American Automobile Insurance Company, a Missouri Corporation, authorized to do business within the State of Oregon, do hereby jointly and severally undertake and promise on the part of the said Plaintiff-appellant that they will pay all costs and disbursements which may be awarded against them because of and on said

Appeal not to exceed the sum of Two Hundred Fifty and No One Hundredths ($250.00) Dollars.

Signed, Sealed and Dated November 14, 1958.

/s/ JOHN L. OWEN,
Principal.

[Seal] AMERICAN AUTOMOBILE INSURANCE COMPANY,

By /s/ STANLEY P. DUYCK,
Attorney-in-Fact.

Countersigned:

/s/ C. R. RATHBUN,
Oregon Resident Agent.

[Endorsed]: Filed November 18, 1958.

In the United States District Court
for the District of Oregon

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Amended complaint for damages for personal injuries; Answer; Stipulation that answer heretofore interposed stand as answer to amended complaint; Pretrial order; Verdict; Motion for a new trial; Order deny-

ing motion for new trial; Motion for entry of judgment nunc pro tunc; Judgment; Notice of appeal; Costs on appeal bond; Designation of record on appeal; Motion and order extending time to docket appeal; Motion and order extending time to docket appeal; Statement of points; Supplemental designation of record on appeal and Transcript of docket entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 9195, in which John L. Owen is the plaintiff and appellant and Sears, Roebuck and Company, a corporation, is the defendant and appellee; that the said record has been prepared by me in accordance with the designations of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith the reporter's transcript of proceedings, and two copies are being forwarded under separate cover.

I further certify that the cost of filing the notice of appeal, $5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 10th day of February, 1959.

[Seal] R. DeMOTT,
Clerk;

By /s/ THORA LUND,
Deputy.

[Endorsed]: No. 16366. United States Court of Appeals for the Ninth Circuit. John L. Owen, Appellant, vs. Sears, Roebuck and Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: February 11, 1959.

Docketed: February 17, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16366

JOHN L. OWEN,

Appellant,

vs.

SEARS, ROEBUCK AND CO., a Corporation,

Respondent.

STATEMENT OF POINTS

Comes now the appellant and pursuant to Rule 17 (6) of this Court, files his Statement of Points as follows:

I.

That there was substantial evidence presented in the trial of this cause from which the jury could find that the respondent sold a garment which was not reasonably fit for the purpose intended.

II.

There was substantial evidence presented from which the jury could find that the garment in question was sold by the respondent to the appellant.

III.

Any requirement of notice of breach of warranty under the Uniform Sales Act (ORS 75.490) was satisfied by the appellant.

IV.

The respondent waived any requirement of notice of breach of warranty under the Uniform Sales Act (ORS 75.490).

V.

Appellant suffered substantial injuries as the approximate result of the sale and breach of the implied warranty of fitness by the respondent.

Respectfully submitted,

NICHOLAS GRANET,

By /s/ RALPH W. DUNCANSON,
Of Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 20, 1959.